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No. .....

In the Supreme Court of the United States

October Term, 1982

FINAU F. MILA and ANAU S. FAINGA,
Petitioners,

v.

DISTRICT DIRECTOR OF THE DENVER, COLORADO DISTRICT OF THE IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Whether the Immigration and Naturalization Service may, contrary to a clear expression of congressional intent, add an extra-statutory requirement to the term "adopted" in 8 U.S.C. § 1101(b)(1)(E) that excludes from this country persons adopted in countries where adoption is practiced by custom and is regarded as creating a bona fide family relationship.

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FINAU F. MILA and ANAU S. FAINGA,
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v.

DISTRICT DIRECTOR OF THE DENVER, COLORADO DISTRICT OF THE IMMIGRATION AND NATURALIZATION SERVICE, UNITED STATES DEPARTMENT OF JUSTICE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioners Finau F. Mila and Anau S. Fainga respectfully pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on April 19, 1982.

OPINIONS BELOW

The opinion of the court of appeals is reported at 678 F.2d 123 (10th Cir. 1982). The opinion of the District Court for the District of Utah is reported at 494 F. Supp. 998 (D. Utah 1980). The decision of the

Board of Immigration Appeals is unreported. All appear in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on April 19, 1982. A timely petition for rehearing was denied on June 2, 1982. On August 25, 1982, Mr. Justice White extended the time for filing this petition to September 30, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

8 U.S.C. § 1101(υ)(1)(E) provides in pertinent part:

> (b) As used in titles I and II —
>
> (1) The term "child" means an unmarried person under twenty-one years of age who is —
>
> * * *
>
> (E) a child adopted while under the age of sixteen years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years: Provided, That no natural parent of any such adopted child shall thereafter, by virtue of such parentage, be accorded any right, privilege, or status under this Act.

8 U.S.C. § 1153(a)(5) provides in pertinent part:

> (a) Aliens who are subject to the numerical limitations specified in section 201(a) [1151(a)] shall be allotted visas as follows:
>
> * * *

> (5) Visas shall next be made available, in a number not to exceed 24 per centum of the number specified in section 201(a)(1) or (2) [1151(a)(1) or (2)], plus any visas not required for the classes specified in paragraphs (1) through (4), to qualified immigrants who are the brothers or sisters of citizens of the United States provided such citizens are at least twenty-one years of age.

STATEMENT OF THE CASE

Petitioners Finau F. Mila and Anau S. Fainga were raised as brother and sister in the Kingdom of Tonga, a cluster of islands in the South Pacific. Miss Fainga was adopted at birth by Mr. Mila's mother under a centuries-old Tongan custom recognizing adoption among close relatives. (Miss Fainga's natural mother is Mr. Mila's aunt.) There is no other method or procedure under Tongan law by which Miss Fainga could have been adopted. Mr. Mila became a United States citizen and filed a petition pursuant to 8 U.S.C. § 1153(a)(5) to have the Immigration and Naturalization Service ("INS") classify Miss Fainga as the sister of a United States citizen, which would allow her to receive an otherwise practically unavailable permanent visa. That section gives preference in obtaining permanent visas to brothers and sisters of United States citizens. To establish a brother-sister relationship, the brother and sister must be "children" of a common parent as defined in 8 U.S.C. § 1101(b)(1). *Nazareno v. Attorney General*, 512 F.2d 936 (D.C. Cir.), *cert. denied*, 423 U.S. 832 (1975). Adopted children must meet the requirements of 8 U.S.C. § 1101(b)(1)(E):

> (E) a child adopted while under the age of sixteen years if the child has thereafter been in the legal custody of, and has resided with, the adopting parent or parents for at least two years. . . .[1]

The INS did not contend that the petition failed to comply with the three requirements set out in § 1101 (b)(1)(E). But the INS added a fourth requirement, that the adoption be affirmatively recognized by Tongan statutes, and denied the petition on the ground that in Tonga the adoption of legitimate children is governed by custom rather than statute.[2] The Board of Immigration Appeals dismissed the petitioners' appeal on the same ground.

The petitioners sought review of the Board's decision in the district court pursuant to 5 U.S.C. § 701, 8 U.S.C. § 1329 and 28 U.S.C. §§ 1331(a), 2201. The district court reversed, finding that there was a bona fide parent-child relationship and that the INS interpretation adding an additional requirement to 8 U.S.C. § 1101(b)(1)(E) is unreasonable because it unjustifiably discriminates against persons from countries sanctioning adoption by custom rather than by statute. It is also inconsistent with the legislative history demonstrating that the Immigration and Nationality Act was in-

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[1] In 1981 this section was amended to raise the age limit for adoption from fourteen to sixteen years. Act of Dec. 29, 1981, Pub. L. No. 97-116, § 2(b), 1981 U.S. Code Cong. & Ad. News (95 Stat.) 1611.

[2] Although the INS in this case complains only in general terms that customary adoption in Tonga fails to create a "legal status" or a "legal relationship," In re Fainga (BIA 1979) (unreported), Appendix at 21, 22, it is clear that the INS would recognize such adoptions in Tonga only if they were authorized by staute or evidenced by some sort of juridical act.

tended to recognize bona fide relationships and preserve genuine family units. 494 F. Supp. at 1000, Appendix at 18.

A divided court of appeals, with Judge McKay dissenting, reversed the district court's judgment and reinstated the INS denial of the petition on the ground that the district court did not defer to the INS interpretation of the statute. The majority of the court of appeals required the petitioners to show that the INS interpretation was unreasonable and lacked any rational basis. 678 F.2d at 126, Appendix at 7.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW FORCES MANY FAMILIES TO CHOOSE BETWEEN REMAINING IN THEIR HOME COUNTRIES AND LEAVING THEIR ADOPTED CHILDREN BEHIND.

The INS has refused to recognize customary adoptions in almost every country.[3] As a result, adopted

[3] The INS has recognized customary adoption only under Chinese law as practiced in Hong Kong and Taiwan. **Matter of Ng**, 14 I & N Dec. 135 (BIA 1972); **Matter of Yue**, 12 I & N Dec. 747 (BIA 1968). The INS recognizes Chinese customary adoptions because the Tsing Code, which is the basis of Chinese law, "recognized" informal adoption, although it gave the informally adopted child no inheritance rights and required no governmental or judicial approval.

The INS has recently refused to recognize an adoption occurring in the People's Republic of China because it was unable to determine the legal status of adoption in that country. The Board of Immigration Appeals remanded the case with instructions that the petitioner sustain her burden of proving that adoptions are legally valid in the People's Republic of China (which the INS with the help of

children from Moslem countries, with a total population of almost 600 million people, are excluded because Islamic law does not recognize adoption. *Matter of Benjamin*, 15 I & N Dec. 709 (BIA 1976) (Iraq); *Matter of Mozeb*, 15 I & N Dec. 430 (BIA 1975) (Yemen Arab Republic); *Matter of Rehman*, 15 I & N Dec. 512 (BIA 1975) (Pakistan); *Matter of Boghadi*, 12 I & N Dec. 666 (BIA 1968) (Egypt). In *Matter of Benjamin, supra*, an adoption took place in Iraq under the laws of the Chaldean Catholic Church, to which the adopting parents belonged. The INS, however, still refused to honor the adoption because it occurred in a country whose government recognizes Islamic law. The INS has also refused to recognize adoptions in the Netherlands Antilles, with a population of 275,000, *Matter of B....*, 9 I & N Dec. 521 (BIA 1961), and in Tonga, with a population of 100,000, in this case.

Under the INS interpretation of 8 U.S.C. § 1101 (b)(1)(E), sustained by the court of appeals, families from these countries which receive permanent visas must either decline the visas or leave their adopted children behind. Customary adoption in these countries will not be recognized no matter how genuine the family unit, how close the relationship between parent and adopted child or how well established the practice of customary adoption. The INS justified this result in the present case

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[3] **Continued**

the Library of Congress had been unable to determine). **Matter of Ho**, Interim Decision No. 2887 (BIA Oct. 8, 1981). Thus the INS threatens to exclude 970 million people from those whose adoptive relationships may be recognized.

on the basis of a letter from the Tongan Crown Solicitor stating:

> There is no provision in our law for the adoption of children born legitimately. Nevertheless it has been a common practice in Tonga for relatives to raise and maintain children, including legitimate children as part of the family and to treat them in all respects as if they were legally adopted. Such "adoption" does not give the child any legal right in the estate of the foster parent and is not recognized as legally valid under Tongan law.

678 F.2d at 125-26, Appendix at 5. The Crown Solicitor, whose opinion the INS had requested on the question of whether adoptions were recognized in Tonga but who had not been informed of the case before the INS or what use would be made of his reply, omitted the following information that the record now contains:

> (1) Customary adoption creates "legal custody" under Tongan law inasmuch as parents who give their child up for customary adoption, if they later change their minds, cannot force the adopting parents to return the child. Record at 36-37, ¶32.[4]
>
> (2) Evidence of Tongan customs is admissible in Tongan courts. Land courts have special "assessors" who sit with them to advise the judge of relevant Tongan customs. Customs are enforced unless specifically superseded by the written statutes or constitution. 678 F.2d at 126, Appendix at 6; Record at 34-35, ¶¶20, 25.

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[4] "Record" refers to the record on appeal in the Tenth Circuit.

(3) Evidence of customary adoption was dispositive in the only relevant reported cases before the Tongan courts. 678 F.2d at 126, Appendix at 6; Record at 35-36, ¶¶23, 27.

(4) Tonga has a statute that specifically sanctions the adoption of illegitimate children, but no mention is made of legitimate children like Miss Fainga. Tongan custom therefore controls with regard to legitimate children. 678 F.2d at 124, Appendix at 2; Record at 34, ¶¶16, 20.

(5) Neither statutorily adopted illegitimate children nor customarily adopted legitimate children may inherit from their adopting parents. 678 F.2d at 126, Appendix at 5.

Judge McKay observed in his dissenting opinion that the Crown Solicitor's letter, when read with this additional information, stands for the "compelling" proposition that in Tonga customarily adopted children are treated exactly like natural children except with regard to inheritance rights. He also noted the bizarre result of an INS rule that would recognize a statutorily adopted illegitimate child but not a customarily adopted legitimate child, even though the wardship is permanent and enforceable in each case and neither kind of adopted child has any inheritance rights. Judge McKay called this distinction between statutorily and customarily adopted children "unprincipled." 678 F.2d at 127, Appendix at 10.

Not only is this distinction unprincipled, but it is

inconsistent with the legislative history, which shows that Congress intended that the Act be liberally construed to recognize bona fide family relationships and preserve genuine family units. *E.g.*, H.R. Rep. No. 1365, 82d Cong., 2d Sess. 29, *reprinted in* 1952 U.S. Code Cong. & Ad. News 1653, 1680; *id.* at 1691 ("well-established policy of maintaining the family unit wherever possible"); Veto Message of June 25, 1952, H.R. Doc. No. 520, 82d Cong., 2d Sess., 98 *Cong. Rec.* 8225 (1952) (act contains many "clearly desirable" steps "toward preserving the integrity of the family"); H.R. Rep. No. 1199, 85th Cong., 1st Sess. 7-8, *reprinted in* 1957 U.S. Code Cong. & Ad. News 2016, 2020-2021; 85th Cong., 1st Sess., 103 *Cong. Rec.* 16301 (1957) (remarks of Mr. Rodino and Mr. Cellar); *id.* at 16307 (remarks of Mr. Barrett); *id.* at 16308 (remarks of Mr. Eastland); *id.* at 15497 (remarks of Mr. Pastore); H.R. Rep. No. 1553, 94th Cong., 2d Sess. 2, 4-5, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6073-6074, 6076 ("principles of equity and family reunification as the basis of our immigration policy"). The District Court found the "clear legislative intent . . . to preserve the genuine family unit," and required the INS to look to "the reality of the relationship and not to the manner in which it arises." 494 F. Supp. at 1000, Appendix at 18. Judge McKay agreed that 8 U.S.C. § 1101(b)(1)(E) requires the INS to "review foreign adoptions with an eye to preserving genuine family relationships." 678 F.2d at 126, Appendix at 8.

Even the majority of the court of appeals conceded that "a broader interpretation would recognize and help

to preserve some families that suffer under the INS interpretation." 678 F.2d at 126, Appendix at 7. Nevertheless, the majority of the court of appeals accepted the INS interpretation because it was "a reasonable construction." *Id.* This so-called "reasonable construction" arbitrarily creates two classes of adopted children that are accorded radically disparate treatment. Such an irrational classification is forbidden by the Fifth Amendment's guarantee of equal protection. Under the INS interpretation a Tongan parent who has become a U.S. citizen can obtain preferred status for his statutorily adopted child whereas a similar parent of a customarily adopted child cannot, even though under Tongan law both children have identical rights. *Cf. Logan v. Zimmerman Brush Co.*, 102 S.Ct. 1148 (1982). Avoiding this constitutional problem is another reason why the INS interpretation should be reversed.

2. THE TENTH CIRCUIT'S OPINION CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS THAT HAVE REFUSED TO DEFER TO RESTRICTIVE INS STATUTORY INTERPRETATIONS THAT ARE CONTRARY TO CONGRESSIONAL INTENT.

Congress set out in the six subsections of 8 U.S.C. § 1101(b)(1) of the Act criteria for determining those children entitled to visa preferences. Each subsection contains the specific restrictions Congress thought necessary to prevent fraud. Nevertheless, in interpreting the statutory definitions, the INS has consistently attempted

to impose additional requirements that narrow these definitions, which is contrary to the congressional purpose of recognizing bona fide relationships and keeping families together. Other courts of appeals have reversed these attempts and, unlike the Tenth Circuit, have refused to acquiesce in the agency's interpretation in light of the Act's legislative history.

In *Palmer v. Reddy*, 622 F.2d 463 (9th Cir. 1980), the Ninth Circuit refused to accept an INS interpretation of the term "stepchild," stating tersely that the statute did not authorize the INS to add restrictive conditions to the definition. The statutory language contains only one hurdle: that the child be under 18 when the stepparent is married.[5] Nevertheless, until the Ninth Circuit acted, the INS had gone beyond the literal words of the statute to require that the stepparent reside with and care for the child or demonstrate an active parental interest in the child's support, instruction and welfare. *Matter of Moreira*, Interim Decision No. 2720 (BIA July 16, 1979).[6]

Similarly, in *Kaliski v. District Director*, 620 F.2d

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[5] In § 1101(b)(1)(B) a child is defined to include "a stepchild, whether or not born out of wedlock, provided the child had not reached the age of eighteen years at the time the marriage creating the status of stepchild occurred."

[6] In so ruling, the Ninth Circuit followed two earlier district court decisions that had also struck down INS attempts to add conditions to the definition of "stepchild". **Andrade v. Esperdy**, 270 F. Supp. 516 (S.D.N.Y. 1967); **Nation v. Esperdy**, 239 F. Supp. 531 (S.D.N.Y. 1965). The INS, however had been undaunted by the earlier decisions and refused to follow them in **Palmer v. Reddy, supra**, until compelled to do so by the Ninth Circuit.

214 (9th Cir. 1980), the Ninth Circuit reversed an INS interpretation that added restrictive conditions to the definition of a "legitimated" child.[7] The Court of Appeals found that the additional requirement was inconsistent with the Act's purpose of reuniting families and that it discriminated against families from countries with strict legitimation requirements.

The Second Circuit, a few years earlier, struck down a similarly restrictive INS interpretation of the definition of "legitimated" child. In *Lau v. Kiley*, 563 F.2d 543 (2d Cir. 1977), the INS refused to accept as legitimated a child born in China, whose law made no distinction between legitimate and illegitimate children. The INS argued that the statutory definition required some form of "legal" paternity proceeding, and that since no such proceeding had taken place, the child had not been legitimated. Like the Ninth Circuit in *Kaliski*, the Second Circuit reversed the INS on the ground that its requirement of a legal proceeding was unwarranted by the stat-

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[7] An illegitimate child may be considered to be the child of his father if "legitimated under the law of the child's residence or domicile, or under the law of the father's residence or domicile, whether in or outside the United States, if such legitimation takes place before the child reaches the age of eighteen years and the child is in the legal custody of the legitimating parent . . . at the time of such legitimation." 8 U.S.C. § 1101(b)(1)(C).

Mr. Kaliski, a native of Yugoslavia, had an illegitimate child in Yugoslavia and lived with the child for seven years until 1941, when he was interned in a German prisoner-of-war camp. In 1953, when his child was 19, Mr. Kaliski moved to California. California law retroactively recognized as legitimating acts Mr. Kaliski's living with and acknowledgment of his child in Yugoslavia many years earlier. The INS refused to recognize Mr. Kaliski's child, contending that the father or child must begin residing in the jurisdiction recognizing the legitimation before the child's eighteenth birthday.

utory language and was inconsistent with the Act's purpose of family reunification.[8] *See also Tovar v. Immigration & Naturalization Service*, 612 F.2d 794, 797 (3d Cir. 1980) (reversing a restrictive INS interpretation of the statute that failed to allow consideration of hardship to a grandchild if the grandmother was deported and stating "federal courts have plenary review of questions of law, involving questions of statutory construction and interpretation").

The INS decision in the instant case is just like the many reversed by other courts of appeals: it adds a restrictive condition to the statute. The Tenth Circuit's affirmance of this decision because it is "reasonable" stands in stark contrast to decisions of the Second, Third and Ninth Circuits. By requiring deference to a restrictive INS construction of the Act without seriously considering whether that construction does violence to the congressional purpose, the court of appeals abdicated

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[8] The same pattern of restrictive INS interpretation and reversal by the courts can be seen in other sections of the Immigration and Nationality Act. Attempts to add requirements of "continuing vitality" to marriages between citizens and aliens have been rejected in the courts. **Dabaghian v. Civiletti**, 607 F.2d 868 (9th Cir. 1979); **Whetstone v. Immigration & Naturalization Service**, 561 F.2d 1303 (9th Cir. 1977); **Bark v. Immigration & Naturalization Service**, 511 F.2d 1200 (9th Cir. 1975); **Chan v. Bell**, 464 F. Supp. 125 (D.D.C. 1978). Outside the family law area, the same pattern persists. **Kamheangpatiyooth v. Immigration & Naturalization Service**, 597 F.2d 1253 (9th Cir. 1979) (discretionary suspension of deportation); **Yui Sing Tse v. Immigration & Naturalization Service**, 596 F.2d 831 (9th Cir. 1979) (immigration labor certificate); **Ruangswang v. Immigration & Naturalization Service**, 591 F.2d 39, 43-44 (9th Cir. 1978) ("there simply is no room for the agency to interpret the regulation so as to add another requirement.").

the judicial function in a way that is inconsistent with the decisions of other circuits.[9] As a result, the INS has effectively been allowed to amend the Act to exclude nearly all customarily adopted children in the world, while recognizing statutorily adopted children with identical rights.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

September 30, 1982.

Respectfully submitted,

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[9] The Court's decision in **Immigration & Naturalization Service v. Wang**, 450 U.S. 139 (1981) (per curiam) does not control the case at bar. **Wang** involved the interpretation of 8 U.S.C. § 1254(a)(1) in which Congress expressly reserved the interpretation of "extreme hardship" to the Attorney General.

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